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April 25, 2011

VIA HAND DELIVERY TO THE CITY CLERK'S OFFICE

Santa Barbara City Council
c/o Santa Barbara City Clerk's Office, City Hall
De la Guerra Plaza
735 Anacapa Street
Santa Barbara, CA 93101

Re: Appeal of Planning Commission's Certification of the Final EIR for the Valle Verde Retirement Community Project (900 Calle de los Amigos) and of its Subsequent Approval of the Project on April 14, 2011

Dear Mayor and Members of the City Council:

On behalf of Service Employees International Union-United Healthcare Workers West ("UHW") and Friends of Valle Verde ("FVV"), we herewith appeal both above-referenced actions taken by the Planning Commission on April 14, 2011. If allowed to stand, the certification of the Final EIR (EIR) for the proposed Valle Verde Retirement Community Project ("Project") could have major unpredictable consequences which have not been adequately disclosed, analyzed, or mitigated by the EIR. If allowed to stand, the project's approval would lack legitimacy until the present challenge to the EIR is settled.

Although UHW and FVV recognize the importance of expanding retirement community facilities to meet the needs of our growing elderly population, there are serious deficiencies in the EIR and its responses to public and expert comments. As a labor organization that represents workers in retirement communities throughout the state, UHW takes the long view that such expansion must be approached in each instance in a way that is environmentally sound and respectful of valid concerns voiced by the larger community in order to pave the way for acceptance and cooperation, rather than backlash, when such projects are proposed in the future. As a coalition of labor, environmentalists, and community members, FVV advocates a careful approach to development that builds community.

We urge members of the City Council to grant the appeal and order revision and recirculation of the EIR in light of the substantial evidence provided by many commenters including UHW and FVV identifying potentially significant environmental impacts that will be caused by the construction and operation of this Project.

In preparing our comments and this appeal, our office reviewed the EIR, comments, and responses, and consulted planning and biology experts. Based on our research and review of the EIR, it is our opinion that the Project is likely to have significant environmental impacts on biological resources, cultural resources, environmental hazards, public services, transportation and circulation, and land use, which the EIR has failed to either adequately disclose, analyze, or mitigate.

Some of the environmental impacts could potentially be mitigated, but because the EIR deemphasized likely impacts, feasible mitigation has not been identified. Even where mitigation measures are proposed, they are often inadequate, unrealistic or the EIR defers definition to a future, uncertain date and individuals. Mitigation measures that are deferred or ill-defined do not meet the requirements of CEQA.

Any approval of the EIR without addressing the EIR's deficiencies subjects the City to legal challenge under CEQA. We urge members of the City Council to reassess the impact analysis as provided herein and recirculate the EIR once the flaws are corrected and all feasible mitigation measures evaluated.

PROJECT HISTORY AND CURRENT PROPOSAL

The Valle Verde Retirement Community ("VVRC"), located in the Hidden Valley neighborhood in the southwestern portion of the City of Santa Barbara, is approximately 59.75 acres in size, comprised of five legal parcels. It is bordered by residential areas to the south and west; the La Cumbre Country Club to the north; and Hidden Valley Park, Arroyo Burro Creek and residential uses to the east. Current residential facilities include 213 apartments; 11 studio units; a 45-room, 48-bed assisted living facility; a 36-room, 80 bed skilled nursing facility; and a six-bed hospice facility. VVRC also includes an administration building, dining/multi-purpose building, maintenance building, salon/staff lounge, recreation building; gazebo structures, and a two-unit/four room bed & breakfast for visitors. VVRC has been allowed to exist in the midst of a single-family residential zone based on a conditional use permit ("CUP").

The proposed project would add 33 net new residential units, the majority proposed adjacent to established single-family residential neighborhoods and/or sensitive oak woodland habitat. It would also result in additions, remodels or demolition and reconstruction of the assisted living facility, administration building, dining/multi-purpose building, maintenance facility, and parking areas. This increased development would require a CUP amendment, a lot line adjustment; and several zoning ordinance modifications to reduce required street and yard setbacks and building separation distance.

As a preliminary matter, VVRC's track record on expansion and oak woodland preservation casts a shadow over VVRC's request for environmental approval of the current proposed expansion.

VVRC was originally constructed under a 1960 CUP allowing development of 182 independent care units and a 15-bed skilled nursing facility. Among other requirements, the CUP specified that a maximum of 350 residents *including resident staff* could be located on the project site.

Though other CUPs and variances have been approved throughout the years, it remained a condition of use in the current 1984 CUP to limit residency to 350. According to the EIR, VVRC is currently far out of compliance with this limit, housing 356 residents plus 153 full-time equivalent (meaning a greater number when part-time are counted as individuals) staff.¹

Moreover, the 1984 Expansion CUP EIR stated in its project description that the “proposed expansion would be the *final phase of development* of existing Valle Verde lands, that has been taking place over the past 17 years.”² Yet VVRC now proposes significant additional development. Approval of these incremental but substantial expansions over the years has created a creeping effect where a large and inconsistent land use now shakily co-exists within an area originally designated as single family homes and natural woodland habitat.³

As a condition of approval for the 1984 Conditional Use Permit, the City required that four (4) acres of on-site oak woodland area be dedicated to the City. However, the dedication was never implemented. Though the current EIR proposes to dedicate or otherwise restrict development rights on this original four-acre area, plus an additional 5.8-acre area, it begs the question why the original dedication, an express *condition of approval* for the 1984 CUP, was never implemented.⁴

LEGAL FRAMEWORK

CEQA requires that an agency prepare and certify an EIR analyzing the potential environmental impacts of any project it proposes to approve that “may have a significant effect on the environment.” (Pub. Res. Code § 21100.) The EIR is the very heart of CEQA.⁵ “The ‘foremost principle’ in interpreting CEQA is that the Legislature intended the Act to be read so as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.”⁶

CEQA has two basic purposes, neither of which the EIR satisfies. First, CEQA is designed to inform decision-makers and the public about the potential, significant environmental effects of a project.⁷ “Its purpose is to inform the public and its responsible officials of the environmental consequences of their decisions before they are made. Thus, the EIR ‘protects not only the environment but also informed self-government.’”⁸ The EIR has been described as “an environmental ‘alarm bell’ whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return.”⁹

¹ See Valle Verde Residents and Staffing, EIR §4.2.3

² See Letter # 10, pp. 55-56.

³ See Valle Verde Development History, EIR §4.2.2

⁴ See EIR §3.3.10

⁵ *Dunn-Edwards v. BAAQMD* (1992) 9 Cal.App.4th 644, 652.

⁶ *Communities for a Better Environment v. Calif. Resources Agency* (2002) 103 Cal. App. 4th 98, 109.

⁷ 14 Cal. Code Regs. (“CEQA Guidelines”) § 15002(a)(1).

⁸ *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564.

⁹ *Berkeley Keep Jets Over the Bay v. Bd. of Port Comm’rs.* (2001) 91 Cal. App. 4th 1344, 1354 (“Berkeley Jets”); *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.

Second, CEQA directs public agencies to avoid or reduce environmental damage when possible by requiring alternatives or mitigation measures.¹⁰ The EIR serves to provide public agencies and the public in general with information about the effect that a proposed project is likely to have on the environment and to “identify ways that environmental damage can be avoided or significantly reduced.”¹¹ Public agencies must deny approval of a project with significant adverse effects when feasible alternatives and mitigation measures can substantially lessen such effects.¹² CEQA section 21002 requires agencies to adopt feasible mitigation measures in order to substantially lessen or avoid otherwise significant adverse environmental impacts of a proposed project.¹³ To effectuate this requirement, EIRs must set forth mitigation measures that decision-makers can adopt at the findings stage of the process.¹⁴ For each significant effect, the EIR must identify specific mitigation measures. Where several potential mitigation measures are available, each should be discussed separately and the reasons for choosing one over the other should be stated.¹⁵ Mitigation measures should be capable of “avoiding the impact altogether,” “minimizing impacts,” “rectifying the impact,” or “reducing the impact.”¹⁶ An EIR must respond to specific suggestions for mitigating a significant impact unless the suggested mitigation is “facially infeasible.”¹⁷ The response need not be exhaustive, but it should evince good faith and a reasoned analysis.¹⁸

Decision-makers must fulfill the state’s policy that “public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available that would substantially lessen the significant environmental effects of such projects.”¹⁹ Each public agency is required to “mitigate or avoid the significant effects on the environment of projects that it carries out or approves whenever it is feasible to do so.”²⁰

The remainder of this appeal provides an analysis of the Draft and Final EIR’s failure to meet these basic requirements of CEQA for the Valle Verde project, its failure to adequately respond to public and expert comments, and its failure to propose adequate mitigation. It is our opinion that the Planning Commission is legally required to revise the Final EIR to address these issues and recirculate the document for public review.

¹⁰ CEQA Guidelines § 15002(a)(2) and (3). *See also, Berkeley Jets, supra*, 91 Cal. App. 4th, at p. 1354; *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564; *Laurel Heights Improvement Ass’n v. Regents of the University of California* (1988) 47 Cal.3d 376, 400.

¹¹ CEQA Guidelines § 15002(a)(2)

¹² *Sierra Club v. Gilroy City Council* (1990) 222 Cal.App.3d 30, 41.

¹³ *See also*, Pub.Res.Code § 21081(a); CEQA Guidelines § 15370.

¹⁴ CEQA Guidelines § 15126(c).

¹⁵ CEQA Guidelines § 15126(c).

¹⁶ CEQA Guidelines § 15370.

¹⁷ *Los Angeles Unified School Dist. V. City of Los Angeles* (1997) 58 Cal.App.4th 1019, 1029 (“ Under the CEQA statute and guidelines a mitigation measure is ‘feasible’ if it is ‘capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors (citations).”)

¹⁸ *Ibid.*

¹⁹ Pub. Res. Code § 21002.

²⁰ Pub. Res. Code § 21002.1(b)

I. THE PROJECT DESCRIPTION IS INADEQUATE UNDER CEQA.

An accurate and complete project description is the foundation of an EIR and is necessary for an intelligent evaluation of the potential environmental impacts of a project. As explained in the discussion following Section 15124 of the CEQA Guidelines,²¹ an EIR must describe the proposed project “in a way that will be meaningful to the public, to the other reviewing agencies, and to the decision-makers.” The state court of appeal has declared that “[a]n accurate, stable and finite project description is the *sine qua non* of an informative and legally adequate EIR.”²² In contrast, “[a] curtailed, enigmatic or unstable project description draws a red herring across the path of public input.” The court further concluded that “[o]nly through an accurate view of the project may affected outsiders and public decision-makers balance the proposal’s benefit against its environmental costs, consider mitigation measures, assess the advantage of terminating the proposal (*i.e.*, the ‘no project’ alternative) and weigh other alternatives in the balance.”²³ As the leading treatise on California environmental law has noted:

The adequacy of an EIR’s project description is closely linked to the adequacy of the EIR’s analysis of the project’s environmental effects. If the description is inadequate because it fails to discuss the complete project, the environmental analysis will probably reflect the same mistake.²⁴

Here, the EIR fails to provide an adequate and complete project description, and therefore fails to meet the requirements of CEQA. In particular, the proposed project fails to adequately address landscape design for replacement trees; construction schedule, equipment, and workforce; staffing, visitor and even resident schedules that would affect parking and traffic issues; use of major hubs such as Modoc/Las Positas/101 interchange; details on commercial use and expansion; baseline biological analysis, and adequate safety information regarding the high pressure gas line and the high fire designation of the area along Arroyo Burro Creek.

We will discuss each of these issues in more detail below; however, as an example, without knowledge of the number and type of construction equipment (including horsepower, loading factor, hours of operation per day, etc.) and the number of construction workers employed during each of these stages, it is impossible to accurately determine emissions of fugitive dust and criteria pollutant emissions from construction equipment and vehicle exhaust.

Without detailed description of staffing, resident, and visitor use, routing, and hours of use, it is not possible to evaluate parking, traffic, occupancy, and evacuation routes. The fact that staff are described in terms of “full-time-equivalents” does not provide an accurate account of the actual number of staff who need to travel to and from the development, and on what routes and at what hours, where they park, or who lives on site.

²¹ California Code of Regulations, Title 14, Secs. 15000 *et seq.* (“CEQA Guidelines”).

²² *County of Inyo v. City of Los Angeles* (1977) 71 Cal. App. 3d 185, 192.

²³ *Id.*, at 197–98; *see also*, CEQA § 15124; *City of Santee v. County of San Diego* (1989) 263 Cal. Rptr. 340.

²⁴ Kostka and Zischke, “Practice Under the California Environmental Quality Act,” p. 474 (8/99 update).

The EIR completely fails to take into account special waste, toxicity and hazard issues such as disposal of medical waste or a salon on-site. Increasing the number of residents at a facility that provides medical services will no doubt cause an increase in medical waste. Offering salon services comes with toxic dyes and other products that must be safely disposed of. There is no mention of potential increased disposal of diapers for incontinence, unused medicines or other medical and hazardous waste. This in turn creates an increased burden on city services, and could contaminate ground water or adjacent pristine environments if improperly disposed of.

Because of the absence of biological surveys conducted during seasons appropriate to the determination of species presence, biological baselines are essentially non-existent.

Without this information about the Project, the public and decision-makers will not be able to balance the Project's benefits against its environmental cost and evaluate feasible alternatives and mitigation measures. An adequate project description, including the information listed above, must be the basis for any revised environmental document. Based on the huge voids in the Project Description, the EIR does not adequately inform the Planning Commission about the Project in order to make a reasonably informed determination of the Project's potential impacts.

II. THE ENVIRONMENTAL IMPACTS OF THE PROJECT ARE NOT ADEQUATELY DISCLOSED, ADDRESSED OR MITIGATED.

In addition to providing an accurate project description, an EIR must disclose all potentially significant adverse environmental impacts of a project.²⁵ CEQA requires that an EIR not only identify the impacts, but also provide "information about how adverse the impacts will be."²⁶ The lead agency may deem a particular impact to be insignificant only if it produces rigorous analysis and concrete substantial evidence justifying the finding.²⁷ In the absence of adequate disclosure, the public agency cannot fulfill its obligations under CEQA. "[T]he ultimate decision of whether to approve a project, be that decision right or wrong, is a nullity if based upon an EIR that does not provide the decision-makers and the public with the information about the project that is required by CEQA."²⁸

Here, the disclosures regarding environmental impacts are wholly inadequate. Moreover, the responses to public and expert comment, and the proposed mitigations warrant re-analysis, revision, and recirculation of the EIR, as follows:

²⁵ Pub. Res. Code § 21100(b)(1). CEQA Guidelines section 15126(a); *Berkeley Jets*, 91 Cal. App. 4th 1344, 1354.

²⁶ *Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818, 831.

²⁷ *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692.

²⁸ *Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818, 829.

A. Biological Resources

Biological Impacts

The EIR claims there are no significant and unavoidable impacts, but there are four significant impacts that can be mitigated.²⁹ Those potential significant impacts include: (1) removal or disturbance of .24 acres of oak woodland and .12 acres of coastal sage scrub; (2) removal of 15 coast live oak trees and one Monterey pine, as well as significant impact to other coast live oaks, redwoods, Monterey pine and western sycamore by encroachment of more than 20% of the critical root zone; (3) impact on active bird nests, silvery legless lizards and coast horned lizards; and (4) impact on Santa Barbara honeysuckle and mesa horkelia, which are considered “sensitive” plant species. No other significant impacts to biological resources or conditions were identified. The EIR also concludes that all significant and potentially significant biological impacts will be reduced to less than significant with mitigation. The conclusions reached in the EIR are based on incomplete analysis, inadequate baselines, unsupported assumptions, and unproven and deferred mitigation.

As a preliminary matter, encroachment by the Project on one of the last two remaining pristine oak woodlands in Santa Barbara renders mitigation in this realm inadequate. Viable alternatives to construction adjacent to the Oak Woodland region seem to have been rejected out of hand. Frankly, the EIR seems to have addressed these significant biological impacts piecemeal. This alone creates an inadequate assessment. Native plants and animals, and migratory birds, are dependent on habitat. Evaluating and mitigating impact to the oak woodland, birds, reptiles, plant species and grasslands separately creates an incomplete and inadequate picture of an ecosystem that must be protected as a whole. The woodland, for instance, is treated as if ornamental and not the rare intact, relatively undisturbed habitat from understory to canopy that it is. Neither is there any analysis of the permanently reduced food supply for predatory birds who nest in the “Rutherford parcel” due to loss of foraging area.

Human habitation adjacent to many species and encroachment by structures that reduce the size of an ecosystem threaten to eliminate the conditions necessary for species survival. Shade, sun, condensation, water runoff, seepage, noise, light, parking lot run-off of oil or gas, movement and other less tangible effects come with this insidious type of encroachment, all of which endanger this ecosystem that comprises one of the last two remaining oak woodland stands to exist in Santa Barbara and is designated as sensitive by the California Department of Fish and Game, as is the coastal sage scrub habitat. The EIR fails to analyze the ecosystem holistically, and thus provides no assurance that the smaller and smaller remaining native habitats and the species dependent on them will indeed survive. This inadequate treatment of biologically sensitive lands, plants and wildlife not only threatens compliance with CEQA, but the City toys with breach of its duty to adequately protect sensitive, rare or endangered species under the public trust doctrine.³⁰

²⁹ See EIR table 2.3-1

³⁰ *Center for Biological Diversity v. FPL Group, Inc.* (2008) 166 Cal. App. 4th 588; *Pocket Protectors*, 124 Cal.App.4th at 930.)

Species of Concern

The EIR claims to have completed botanical surveys³¹ consistent with Botanical Survey Guidelines of the California Native Plant Society (CNPS 2001)³² and US Fish and Wildlife Service's Guidelines for Conducting and Reporting Botanical Inventories for Federally Listed, Proposed, and Candidate Plants (USFWS 2001).³³

This representation is not true. The CNPS Botanical Survey Guidelines state at paragraph 4.a. that botanical surveys should be "conducted in the field at the proper times of year when special status and locally significant plants are both evident and identifiable." Similarly, the USFWS botanical survey guidelines state that the field investigator should "conduct inventories at the appropriate times of year when target species are present and identifiable. Inventories will include all potential habitats. Multiple site visits during a field season may be necessary to make observations during the appropriate phonological stage of all target species."³⁴

Here, surveys were conducted in December, January and February—the winter months alone. Winter is not the flowering or fruiting period for most plants, and thus it is highly likely that findings were inaccurate. CNPS's Inventory of Rare and Endangered Plants in California provided in Letter #11 from biologist D. Magney shows that October through February are in fact the months with the smallest number of taxa in bloom in Santa Barbara. California Department of Fish and Game Guidelines for assessing the Effects of Proposed Projects on Rare, Threatened, and Endangered Plants and Natural Communities (revised May 8, 2000)³⁵ also states field surveys should be conducted in the field "at the proper time of year when rare, threatened, or endangered species are both evident and identifiable. Usually, this is when the plants are flowering." Because the surveys were conducted at a time unlikely to accurately show sensitive plants, meaning that other unnamed sensitive plant species may indeed be present, the survey does not provide reliable data and must be re-done.

Similarly, though the Project potentially affects habitat for several species of bird, including migratory birds, wildlife surveys were also conducted in winter months. California Department of Fish and Game considers migratory bird breeding season to generally occur between March 1 and September 1.³⁶ In order to evaluate potential danger to birds, nests and bird habitat, surveys should be conducted during breeding months. Because the surveys were conducted at a time unlikely to realistically reveal sensitive wildlife, the survey does not provide reliable data and must be re-done.

Furthermore, the assumption that the steepness of the Arroyo Burro Creek embankment made it unlikely that certain species were present on the parcel is also unsupported. A recognized vertebrate specialist at the Santa Barbara Natural History Museum maintains that a high, steep

³¹ See EIR §5.2.1

³² Attached to Letter #11 at Vol. II pp. 79-81

³³ Attached to Letter #11 at Vol. II pp. 82-83

³⁴ USFWS Botanical Survey guidelines can be found at <http://www.fws.gov/>.

³⁵ Attached to Letter #11 at Vol. II pp. 77-78

³⁶ See DFG Letter #1

creekside bank that is natural and not made of concrete is not a deterrent to a wildlife corridor for animals. As such, the presence of animals accessing the Oak Grove through the Rutherford parcel needs to be reassessed. The EIR also offers unsupported assertions that wildlife species likely to move through the project would be “common species that are frequently found in urbanized areas.” Until the site tampering that occurred shortly before the survey, Oak Grove to Arroyo Burro Creek corridor has historically been a vibrant wildlife corridor; this assertion rings untrue.

Incorrect Baselines

Because inventories were conducted at inappropriate times to assess habitat and population, the baseline for sensitive plants, animals and their habitat were never established. In addition, the baseline at the Rutherford parcel was disturbed prior to field survey.³⁷ Based on testimony of neighbors, the parcel was mowed just prior to the assessment.³⁸

Carrying out the surveys at a time unlikely to provide necessary data and disturbance of the area under assessment renders worthless the EIRs subsequent conclusions: It invalidates the EIR’s claim that, during the field surveys, “no evidence was observed, such as a game trail with animal tracks, scat, or trampled vegetation, which would indicate that this open non-native grassland habitat was used by wildlife as a movement corridor.”³⁹ It means that Table 5.2-1 listing observed vegetation provides an inaccurate account of special status plants known or likely to be present on the site. It also means the EIR’s conclusion that no sensitive plants are located within the areas designated for development and/or fuel modification and thus there is no substantial evidence of significant impact on endangered threatened or rare plant species, is unreliable.⁴⁰ Nor can the EIR’s conclusion that the project will not cause the elimination or substantial disruption of ... wildlife habitat or migration corridors” be trusted.⁴¹

Before approval of an EIR can be considered, population and habitat surveys of flora and fauna must be conducted correctly. The correction of baseline studies necessitates not only revision of the EIR but recirculation under CEQA.⁴² Here too, the claim that surveys were conducted in line with agency requirements, when they clearly were not, causes concern.

Inadequate and Deferred Mitigation

CEQA requires the decisionmakers and the public to be informed of what it is they are adopting, but the EIR is evasive. Public agencies must deny approval of a project with significant adverse effects when feasible alternatives and mitigation measures can substantially lessen such effects.⁴³

³⁷ See photographs and other information posted on Save Hidden Valley’s website, <http://savehiddenvalley.org/>

³⁸ See Letter #13, p. 97; see also Letter #42, p. 278.

³⁹ EIR p. 5.2-8

⁴⁰ EIR p.5.2-12; 5.2-23

⁴¹ EIR p. 5.2-23

⁴² See CEQA Guidelines §15088.5, *Save Our Peninsula Cmte. V. Monterey Cnty. Bd. Of Sups.* (2001) 87 Cal. App. 4th 99, 143

⁴³ *Sierra Club v. Gilroy City Council* (1990) 222 Cal.App.3d 30, 41.

CEQA section 21002 requires agencies to adopt feasible mitigation measures in order to substantially lessen or avoid otherwise significant adverse environmental impacts of a proposed project.⁴⁴ To effectuate this requirement, EIRs must set forth specific mitigation measures that decision-makers can adopt at the findings stage of the process.⁴⁵ Mitigation measures that are optional or are deferred to a date after approval do not meet the requirements under CEQA. Indeed, courts will not countenance mitigation measures that defer goals, objects and criteria for success.⁴⁶

Compounding the problem that baseline biological data are not accurate, the EIR proposes to address mitigation of impact to biological resources including but not limited to special status plant species and oak woodland and coastal sage scrub habitat through creation of habitat restoration plans. Deferral of mitigation to a habitat restoration plan, without adequately identifying who will conduct the plan, how restoration sites will be determined, planting methods, and other necessary details, constitutes deferred mitigation.⁴⁷

Those details that are provided for the habitat restoration plans are similarly inadequate. For instance, the replanting of oak and coastal sage scrub is to be performed on the site “in non-native and/or disturbed habitat”; oak saplings are to be planted in “areas between the new structures on the west side of the property and the oak woodland”; and, “should removal of any sensitive plant be unavoidable,” replacement shall be implemented at a yet-to-be determined site.⁴⁸ These “mitigation” measures and others do not insure that plants species, habitat and wildlife will actually be able to survive in new-found habitats. Absent specific performance standards, deferral of mitigation measures until after project approval is inadequate.⁴⁹

Aside from possible nests, the only sensitive wildlife the EIR deemed to potentially be substantially impacted by the Project are the silvery legless lizards and coast horned lizards. Yet, the mitigation plan for the silvery legless lizards and coast horned lizards is not viable. The EIR proposes an unnamed biologist will “direct the equipment operator to slowly remove vegetation and the top 12 inches of topsoil while the biologist scans the soil for lizards. Any and all reptiles founds shall be relocated to appropriate microhabitats in adjacent, undisturbed habitat out of harm’s way.”⁵⁰ Unless dirt removal will be done by hand, rather than with heavy machinery, this appears to be a pie-in-the-sky scenario for protection.

In addition, there is no showing that the wildlife native to this habitat can just be “relocated” and survive in a different “microhabitat.” Since replacement habitat is not identified, it is impossible to determine the viability of introducing a species into a new habitat. Native species live where they live because the total conditions of a particular ecosystem coalesce to allow their survival.

⁴⁴ See also, Pub.Res.Code § 21081(a); CEQA Guidelines § 15370.

⁴⁵ CEQA Guidelines § 15126(c).

⁴⁶ *Defend the Bay v. City of Irvine* (2004) 119 Cal. App. 4th 1261, 1275.

⁴⁷ See Letter #13 for further detail.

⁴⁸ See table 2.3-1

⁴⁹ CEQA Guidelines §15126.4(a)(1)(B), *Sundstrom v. County of Mendocino* (1988) 2020 Cal.App.3d 296, 307-309.

⁵⁰ See table 2.3-1

There has been no showing that these sensitive species can just be relocated and survive. Again, potential relocation sites need to be identified in advance so that the public has time to verify adequacy of site and provide input, or proposed relocation is not a meaningful mitigation measure.

Because the EIR fails to identify and disclose all significant impacts, fails to create accurate baselines to adequately analyze impacts and potential mitigation, fails to realistically assess impacts and potential mitigation, fails to consider the feasibility of more environmentally sound alternatives, and relies on deferred mitigation, the EIR's assessment of biological impacts fails.

B. Transportation/Circulation

The EIR concludes that the only potential significant impact on transportation and circulation would occur because of increased vehicle trips. The assessment that safety hazards, emergency access, parking and pedestrian/bike concerns would not be significantly impacted is unsupported by fact.

Traffic Sighting

Concerns raised in comment letters regarding corner sight distance at the proposed Torino Drive driveway and other entrances to the site were dismissed in part with the statement that "driveways to the Valle Verde complex are in effect residential driveways as they serve a residential facility."⁵¹ This statement appears intended to equate a driveway to a single family home with an entrance to a 59-acre residential facility; it does not adequately address the concern raised.

The EIR also seems to have evaluated parking density on adjacent streets where residents complain of crowded street parking after staff hours. According to the EIR, parking studies were conducted on Calle de los Amigos at 4:00 p.m., whereas most employees apparently leave work at 3 p.m.⁵² Again, this creates an inadequate baseline, incorrect data, and fails to address community concerns and provide a stepping off point from which to determine impact and feasibility of mitigation.

Traffic Speed

The EIR's evaluation of speed and level of traffic seems to be at odds with concerns raised in comment letters. Neighbors raised concerns of the "high level of traffic" and "excessive speed" along the Calle de los Amigos access road creating a "risky situation" in simply exiting a driveway, as well as creating safety concerns for children, bicyclists, and the numerous elderly pedestrians. The Response simply states that the EIR provided a comprehensive evaluation of traffic impacts and that that speed is an "existing condition."⁵³ Such a response is inadequate to

⁵¹ See Response 6-3.

⁵² See 5.3-25 and comment letter #52 at Vol. II pp. 333-334

⁵³ See Response 7-3, 9-2.

address legitimate concerns regarding traffic density, flow, speed and potential traffic dangers that render mitigation measures necessary.

Traffic Congestion

The EIR analysis was not actually based on trip rates from this site: “Because of the mix of uses currently on the site and the difficulty in identifying which trips are generated by each individual use, it was not possible to develop a specific trip rate that would replicate each individual use on the site. Therefore, an aggregate rate developed from several similar projects was used.” The EIR then surveyed VVRC employees to “confirm distribution patterns” of the project-generated vehicle traffic. These survey results were “very close to” trip distribution assumptions.⁵⁴ However, the employee survey does not include resident trips and visitor trips generated by special events open to the public and thus underestimates actual project-generated increases. The EIR claims that special events are minimal, yet a portion of American Baptist Homes of the West’s tax-exempt status is predicated on public events held at VVRC.

Evacuation

The EIR claims there is a less than significant level of impact on emergency access. This statement is unsupported by evidence. The EIR does not adequately address evacuation in the event of a fire, gas line explosion, or other event necessitating evacuation. Because the region has suffered two fires including the Painted Cave Fire in the last two years necessitating evacuation, the EIR needs to provide more detailed evacuation analysis. Yet the Response simply states that the EIR concluded that the Project “would not result in significant evacuation-related impacts.”⁵⁵ This conclusion is inadequate in light of the two recent fires, its location in a high fire hazard area, the high pressure gas pipeline adjacent to the project, the elderly, dense population, narrow streets with dense parking, and limited escape routes.

The EIR’s emergency evacuation analysis in case of fire addresses neither the number of individuals nor the impact of densely parked streets on egress through Calle de los Amigos and Tornio Drive.⁵⁶ Neither does it seem to take into account potential blockage of routes caused by vehicle collision during panic, parked vehicles, and closure of roads attributable to fire, as occurred during the Painted Cave Fire. The EIR’s conclusion that the proposed project will not result in significant evacuation-related impacts is contrary to fact. The EIR seems to rely on the Santa Barbara County Fire Department’s “no comment” letter. But the “no comment” letter does not constitute approval of the fire plan. In fact, it appears that the fire map relied on by the EIR is not the same fire map on file with the fire department, or perhaps there are two such maps, as the fire map attached to Letter #13 appears to show more severe fire danger.⁵⁷

Completely absent is analysis of evacuation should a San Bruno-type pipeline failure occur.

⁵⁴ See EIR 5.3-12; 9-18.11-46

⁵⁵ See Response 7-4

⁵⁶ See EIR p. 5.3-28

⁵⁷ Attached to Letter #13 at pp. 123-124

The EIR's conclusions that transportation/circulation is not significantly impacted other than increased vehicle trips is without support. The EIR needs to reassess the impact of the proposed project on emergency egress, in light of the location adjacent to a high pressure pipeline and location within a high fire hazard zone. The EIR needs to reassess impact on traffic (including during construction phase, by number of actual employees, and including visitors for special events), parking (at actual peak times) and sighting (especially at dangerous corners) in light of numerous facts raised in public comment contrary to assertions in the EIR. Realistic mitigation measures must then be assessed for feasibility. For some unknown reason, these very real transportation concerns seem to have been undervalued and thus inadequately addressed by the EIR.

C. Hazard/Public Services

The EIR claims the only potentially significant hazard is increased fire hazard in areas with flammable brush, grass and trees, but that this can be mitigated to insignificance. The EIR proposes to mitigate fire hazard by providing a landscape plan to the fire department prior to submission to the environmental analyst for review.⁵⁸ Risk of accidental explosion or release of hazardous substances, creation of health hazard or potential health hazard, and exposure to existing health hazard are deemed less than significant. The designation that hazard from explosion is less than significant is unsupported by fact, in light of the siting adjacent to a high power gas pipeline. Moreover, mitigation for fire danger is inadequate.

High Fire Hazard Area

The Project is located in a High Fire Hazard Area, adjacent to the Arroyo Burro Creek, as designated by Santa Barbara County Building Code Ordinance 4683. Within the past two years, two fires have erupted in the Arroyo Burro Creek area, including the Painted Cave Fire, which burned clear down to Hope Ranch, necessitating evacuation. The EIR's conclusion of no significant impact is not supported by substantial evidence.⁵⁹

Obviously, were fire to threaten the VVRC, it could have catastrophic consequences for the residents, visitors, staff and adjacent communities. Because the elderly population may suffer from mobility problems, because the region is a dry wood and brush area, because of the limited egress, fire danger would most certainly become more significant with the proposed project, yet this was not adequately addressed in the EIR or in responses to comments. The increased danger would affect not only VVRC, but also surrounding communities limited to the same few roads of escape. As Citizens pointed out in Letter No. 12, during the Painted Cave fire, Modoc was impassable.

High Pressure Gas Pipeline

Apparently in response to comments that the adjacent high pressure gas pipeline was not even mentioned in the draft EIR, the final EIR added a single sentence stating: "A high pressure gas

⁵⁸ See EIR p. 2-12 and Appendix A at p. 29

⁵⁹ See EIR p. 5.3-29

pipeline is located south of and adjacent to Torino Drive in the vicinity of the Rutherford parcel portion of the project site.”⁶⁰ The EIR does not provide any information that would enable public officials or the public to evaluate the risks involved in increasing population near the pipeline such as the age of the pipeline, its construction, the leak history of the pipe, the geography, whether the pipeline has automatic shut-off valves, the status of inspections, whether a robotic device called a “smart pig” can be and is used to evaluate corrosion, and other precautions adopted by the pipeline’s owner.

The EIR later dismissed concerns about the pipeline because pipeline explosions are relatively rare:

Recent events in the City of San Bruno have demonstrated that an accident involving a high pressure natural gas pipeline can have a catastrophic effect. However, the likelihood of such an event occurring is extremely low. Such a high consequence but low probability event is not considered to have a significant impact on the proposed project because the project would not increase the potential for an accident to occur and would not substantially increase the effects of an accident should one occur during the lifetime of the proposed project.⁶¹

This response is inadequate and untrue. The EIR offers no evidentiary support or any analysis for the statement that the likelihood of such an event is extremely low. The news media have been rife with recent stories highlighting the increasing likelihood of fatal explosions because many utilities have “resisted implementing recommended safety measures.”⁶² Similarly, the assertion that the project would not substantially increase the effects of an accident should one occur is nonsensical. Should such an accident occur, the increased danger to the residents, visitors and staff at Valle Verde and in surrounding communities would be exacerbated by the increased numbers of people and vehicles trying to evacuate. The fact of a large elderly population which would likely include people with mobility limitations or who were unable to react swiftly in a time of danger would increase danger to themselves and those around them.

In light of recent events at San Bruno, declaring this hazard insignificant without further analysis undermines the entire purpose of CEQA, which is to analyze and, where feasible, mitigate environmental impacts *before* a project is built. The City has only to look to recent events in Japan to realize that planners must consider not merely the most predictable consequences of project approval, but also unlikely yet catastrophic events that may happen with little warning and severe consequences. Certainly prior to March 27, the likelihood of an earthquake, tsunami and resultant damage to the Fukushima Daiichi nuclear power plant were considered unlikely. The City cannot so easily claim that expansion of a facility for elderly citizens with very limited access in the hills of Santa Barbara adjacent to a high pressure gasline and wood and grassland area does not substantially increase the effects should such an accident occur. This potentially

⁶⁰ See EIR §4.1

⁶¹ See EIR § 8.1.2

⁶² See “Recent major natural gas explosions could have been prevented,” Homeland Security News Wire (Apr. 4, 2011), attached as Exhibit A to this comment letter.

catastrophic environmental hazard must be better analyzed, accurate information must be provided, and mitigation measures must be addressed before project approval.

Because the EIR underestimated the significance of both fire and explosion hazards, it also underestimated the significance of impact on public services for fire, paramedic, and other emergency vehicles. The EIR should reassess actual impact of the Project in light of actual fire danger, proximity to a high power gas pipeline, limited access, and the elderly population. Once the actual significance of impact is reassessed, feasible mitigation must be re-evaluated.

D. Land Use Impacts/Compatibility

Numerous comments have already addressed the noticeable problem in this EIR that land use impacts such as compatibility with the surrounding area appear to be inadequately assessed. The EIR acknowledges that the VVRC has been operating since its inception pursuant to a conditional use permit, and that in order to construct the proposed project several waivers of zoning ordinances must be approved. Yet land use considerations appear to be addressed, if at all, under other impact areas rather than identified and addressed separately, as required by CEQA and the City.

Letter #13, points out several inconsistencies: with Zoning Ordinances (setbacks and density); Biological Resource Policy 4.0 in the City's General Plan ("Remaining Coastal Perennial Grasslands and Southern Oak Woodlands shall be preserved, where feasible."); City Charter section 1507 (land development shall not exceed available services and resources). Other comments have pointed out the inconsistency of an ever-growing mixed use facility spreading through a single-family residential neighborhood abutting parkland and sensitive open space as well as grading of hillsides with slopes greater than 30% in conflict with the Visual Resources Policy 2.1.

A project that conflicts with applicable plans or policies designed in whole or part to protect the environment has a potentially significant environmental impact under CEQA, yet these inconsistencies have been inadequately addressed by the EIR and its responses to comments.⁶³

E. Cultural Resources

Prior to European contact, Santa Barbara was occupied by the Chumash. Evidence points to occupation by these Native Americans for the past 9,000 years or possibly more. Archaeological evidence of Chumash civilization has been found in numerous locations in Santa Barbara, including burial sites with human remains.

In accordance with CEQA and City environmental review guidelines (City of Santa Barbara Master Environmental Assessment ("MEA"), *Guidelines for Archaeological Resources and Historic Sites and Structures*) a proposed project would have a significant impact on cultural resources if it would cause a substantial adverse change to an important archaeological resources or disturb any human remains. Further, a significant effect on the environment may occur when

⁶³ CEQA Guidelines App. G§IX(b); *Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 930.

an important or unique archaeological resource is physically demolished, destroyed, relocated, or altered.

Under the MEA *Guidelines*, archaeological resources must be evaluated qualitatively by archaeologists. First, existing conditions on a site must be assessed to identify whether important or unique archaeological resources exist. If important archaeological resources exist on the site, project changes must be evaluated to determine whether they would substantially affect these important resources. As with other significant impacts, an EIR must analyze significant impacts to archaeological resources.

Here, the City appears to have cut corners in approving the Project which will affect previously undeveloped land, the type of land on which it is most likely that archaeological resources may be found which have been relatively unaffected by the long history of development.

The comment letter of Frank Arredondo submitted to the Planning Commission on April 14, 2011, highlights serious deficiencies in the EIR and City's process dealing with potential impacts on archaeological resources. Mr. Arredondo (Ksen~Sku~Mu) is an active member of the Coastal Band of the Chumash Nation, a former director of its board, and he is listed on the Most Likely Descendant (MLD) list for the Chumash Territory and the Native American Contact list with the Native American Heritage Commission.

Mr. Arredondo's letter notes that the Project is located in areas known to be once inhabited by prehistoric Chumash and several village sites and settlements have been found in areas nearby. Burial grounds have been found at similar sites. This information triggers, at minimum, a duty on the part of the City to investigate whether the Project may affect subsurface burial sites.

According to the FEIR:

Archaeological Resources: A portion of APN 049-040-053 and -054 are within a Prehistoric Sites and Water Courses Sensitivity Zone. Development proposed in these areas involves the construction of residential units, parking areas and various common area facilities, including an addition to the Administration Building. An intensive field survey of the entire property, including shovel scrapes in areas of less ground surface visibility, was performed by Stone Archaeological Consulting. No prehistoric or historic cultural materials were identified.

As detailed by Mr. Arredondo, the City's inquiry was inadequate. Although the FEIR stated that an intensive field survey was conducted on December 20, 2008, the City failed to provide a copy of the 2008 survey upon request and no such survey could be found in the City's administrative file. The City referred Mr. Arredondo to the Central Coast Information Center (CCIC). CCIC maintains the California Archaeological Inventory for San Luis Obispo and Santa Barbara Counties and is situated at the Department of Anthropology, University of California, Santa Barbara. However, the 2008 report was not in CCIC's files either. All Mr. Arredondo was able to review was a 2003 report that was in the City's project file as well as in the records of CCIC.

The City's failure to provide a document for public review upon request undermined and invalidated the CEQA process by preventing informed public comment on the findings of the 2008 study upon which the EIR relied.

Mr. Arredondo examined the 2003 archeological report and found it wanting for several reasons. The 2003 study was prepared before the development proposal took its current shape and did not survey the same building footprints in the current project. No phase 1 archeological resources report (or report confirming the nonexistence of archeological resources) was prepared for the southern parcel of the Project where new building footprints were proposed when project plans were revised in 2007.

The shovel scrapes conducted for the 2003 report took place in an area that is now defined as open space. The most that the 2003 report could conclude from these shovel scrapes was that no prehistoric or historic cultural materials were found in what is now projected to be open space, but not whether the same conclusion would apply to the areas where construction will now take place.

Mr. Arredondo's letter details the runaround he received when he attempted to obtain access to whatever more recent archaeological reports the City had in its possession. Local agencies, such as the City, are required to cooperate with the state Native American Heritage Commission (NAHC) and must furnish appropriate sections of their EIRs to the Commission.⁶⁴ Ironically, the FEIR includes a comment from NAHC, identifying Mr. Arredondo as an interested Native American who wished to be contacted when development projects took place within areas of identified and documented archaeological sites. This Project is located in the boundaries of CA-SBa-1530 and on the City's MEA *Cultural Resources Sensitivity Map* and identifies a portion of APN 049-040-053 and 054 within a Prehistoric Sites and Water Course Sensitivity Zone, and should have qualified for consultation with Mr. Arredondo as NAHC advised. Further, under the MEA *Guidelines*, "copies of archaeological report are available for review to Local Native Americans who have concerns about the physical remains of their heritage." Although Mr. Arredondo has credentials that establish he is an appropriate person to receive access to sensitive archaeological documents regarding this Project, the City did not cooperate, effectively and inappropriately evading review by any representative of the Chumash Nation.

The City's failure to permit Mr. Arredondo to review the archaeological reports upon which the City relied was ill-considered. The result is an EIR that cannot be certified without violation of the MEA *Guidelines* as well as CEQA.

III. Revision and Recirculation of the EIR Is Required

The substantial deficiencies in the EIR and responses to comments explained above, in addition to others submitted by concerned experts and public, warrant re-analysis and revision of the EIR. Once revision occurs, the Planning Commission should recirculate the EIR.

⁶⁴ See Pub.Res.Code § 5097.95.

The agency in charge is required to recirculate an EIR when significant new information is added to the EIR after the draft EIR has been provided to the public but before certification.⁶⁵ Examples of significant new information requiring recirculation

- 1) A new significant environmental impact would result from the project or from a new proposed mitigation measure;
- 2) A substantial increase in the severity of an environmental impact would result unless mitigation measures are adopted that reduce the impact to insignificant;
- 3) A feasible project alternative or mitigation measure considerably different from those previously analyzed would clearly lessen the significant environmental impacts of the project, but the project proponents declines to adopt it;
- 4) The draft EIR was so fundamentally and basically inadequate and conclusory in nature that public review and comment were essentially meaningless.

The Project will have numerous highly significant impacts that are not adequately disclosed, analyzed, or mitigated in the EIR. Based on the severity of the EIR's errors and omissions, the EIR should be supplemented to address the issues identified above and re-circulated to allow for public review.⁶⁶ Without these revisions, the EIR is inadequate under CEQA and should not be relied upon by the Planning Commission for approval of the Project.

IV. Conclusion

As illustrated above, inadequacies in the EIR are substantial; left unchanged, this Project could create significant adverse environmental impacts to the City of Santa Barbara, and its human, plant and animal inhabitants. The residents and the City of Santa Barbara will have little opportunity for recourse if this appeal is denied. As such, UHW and FVV respectfully request the City Council grant the appeal and require revision and recirculation of the EIR to address our concerns and those raised by other experts and community members.

Thank you for considering our appeal.

Sincerely,



Theodore Franklin

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⁶⁵ CEQA Guidelines § 15088.5 (a)).

⁶⁶ *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal App. 4th 1184.

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	<u>re 900 Calle de las Amigas</u>
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